

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GERARDO OLIVARES

Claimant

VS.

MID-CONTINENT SPECIALIST, INC.

Respondent

AND

UNKNOWN

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

[illegible]

Docket No. 237,793

ORDER

Claimant appeals the post-award Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated August 2, 2004. In the post-award Preliminary Decision, the Administrative Law Judge (ALJ) determined that since this was post award, and since K.S.A. 44-510f(a)(4) (Furse 1993) limits functional impairment cases to \$50,000, and as claimant had been paid the entire \$50,000 award, claimant was entitled to no additional funds. Therefore, claimant's request for additional temporary total disability compensation was denied.

APPEARANCES

Claimant appeared by his attorney, C. Albert Herdoiza of Kansas City, Kansas. Respondent, being uninsured, appeared not. The Kansas Workers Compensation Fund appeared by its attorney, Michael R. Wallace of Shawnee Mission, Kansas.

ISSUES

Does K.S.A. 44-510f(a)(4) (Furse 1993), which limits functional impairment-only cases to a maximum of \$50,000, also include any ordered temporary total disability compensation in the \$50,000 cap?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board (Board) finds the post-award Preliminary Decision of the ALJ Robert H. Foerschler should be reversed and claimant should be awarded 5.43 weeks of temporary total disability compensation in excess of the \$50,000 limit set forth in K.S.A. 44-510f(a)(4) (Furse 1993).

This matter has been litigated over a period of several years, with the award ultimately being decided by the Kansas Court of Appeals in an unpublished decision issued December 24, 2003.¹ In that opinion, the Kansas Court of Appeals specifically noted that K.S.A. 44-510f(a)(4) restricts permanent partial disability, where functional impairment only is awarded, to \$50,000. The Board's permanent partial disability award of \$55,336.10 for a 40 percent functional whole body disability was reduced to the \$50,000 cap. There was no temporary total disability compensation awarded by either the Board or the Kansas Court of Appeals.

Subsequent to the appellate review, claimant underwent a hip replacement with orthopedic surgeon Danny M. Gurba, M.D., of the Dickson-Diveley Midwest Orthopedic Clinic. This medical treatment was provided pursuant to the post-award Order for medical treatment issued by ALJ Foerschler on July 3, 2003. Temporary total disability compensation was not discussed in the November 13, 2003 post-award hearing before ALJ Foerschler. At that time, the parties were attempting to clarify the extent of Dr. Gurba's authorization.

Ultimately, claimant did undergo surgery under Dr. Gurba's hand and was off work from April 13, 2004, through May 20, 2004, a period of 5.43 weeks. Claimant then proceeded to post-award preliminary hearing on July 8, 2004, requesting only 5 weeks temporary total disability compensation for the period of time claimant was off work.

¹ *Olivares v. Mid-Continent Specialists, Inc.*, No. 90,576 (Kansas Court of Appeals unpublished opinion filed December 24, 2003).

Respondent argued that since they had already paid the full \$50,000 pursuant to the award, additional monies were not due and owing. The sole issue to be determined by the Board in this instance is whether the \$50,000 cap set forth in K.S.A. 44-510f(a)(4) (Furse 1993) includes or excludes temporary total disability compensation.

K.S.A. 44-510f (Furse 1993) states in part:

(a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

...

(4) for permanent partial disability, where functional impairment only is awarded, \$50,000 for an injury or aggravation thereof.

K.S.A. 44-510f (Furse 1993) sets limits not only for permanent partial disability where functional impairment only is awarded, but also for permanent total disability, temporary total disability and temporary partial disability. Under sections 1, 2 and 3 of subsection (a), the legislature discussed specifically the inclusion of temporary total disability compensation in the \$125,000 permanent total disability limits, the \$100,000 temporary total disability limits and the \$100,000 permanent partial disability limits. Only in subsection (4), discussing permanent partial disability's limitations when dealing with functional impairments, is the term "temporary total disability compensation" omitted.

One of the more common rules of statutory interpretation is that expressed in the Latin maxim *expressio unius est exclusio alterius*, i.e., the mention or inclusion of one thing implies the exclusion of another. This rule may be applied to assist in determining actual legislative intent which is not otherwise manifest, although the maxim should not be employed to override or defeat a clearly contrary legislative intention.²

... when legislative intent is in question, we can presume that when the legislature expressly includes specific terms, it intends to exclude any terms not expressly included in the specific list.³

² *State v. Luginbill*, 223 Kan. 15, 574 P.2d 140 (1977) (quoting *In re Olander*, 213 Kan. 282, 515 P.2d 1211 [1973]).

³ *Matter of Marriage of Killman*, 264 Kan. 33, 955 P.2d 1228 (1998) (citing *State v. Wood*, 231 Kan. 699, 647 P.2d 1327 [1982]).

The Board finds the language of K.S.A. 44-510f(a)(4) (Furse 1993) to be clear and unambiguous. The failure by the legislature to mention the term “temporary total disability compensation” clearly intends that that term not be included in that section of the statute.

It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained.⁴

The Board has, on several occasions, limited claimants to the statutory \$50,000 maximum under K.S.A. 44-510f(a)(4), while, at the same time, awarding additional sums representing temporary total disability compensation.⁵

The Board finds K.S.A. 44-510f(a)(4) (Furse 1993) does not include temporary total disability compensation in the \$50,000 maximum. As such, the Board finds that claimant is entitled to the 5.43 weeks of temporary total disability compensation as requested, and the post-award Preliminary Decision of the ALJ dated August 2, 2004, is reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the August 2, 2004 post-award Preliminary Decision of Administrative Law Judge Robert H. Foerschler denying claimant temporary total disability compensation should be, and is hereby, reversed and claimant is awarded 5.43 weeks of temporary total disability compensation for the period April 13, 2004, through May 20, 2004, at the rate of \$333.35 per week totaling \$1,810.09.

IT IS SO ORDERED.

⁴ *Matter of Marriage of Killman*, *supra* (citing *City of Wichita v. 200 South Broadway*, 253 Kan. 434, 855 P.2d 956 [1993]).

⁵ *Biggs v. Davis, Unrein, Hummer, McCallister, Biggs & Head, L.L.P.*, No. 241,091, 2002 WL 433107 (Kan. WCAB Feb. 13, 2002); *Wohler v. Allen Millwork Company*, No. 241,120, 2001 WL 1399446 (Kan. WCAB Oct. 31, 2001); *Matin v. Outside Connections, Inc.*, No. 236,835, 2000 WL 1134440 (Kan. WCAB Jul. 28, 2000).

Dated this ____ day of October 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Mark S. Gunnison/Robin Scully, Attorney for Respondent
Michael R. Wallace, Attorney for the Fund
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director